

10/22/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 13  
GFR

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Compagnie Gervais Danone**

Serial No. 75/621,184

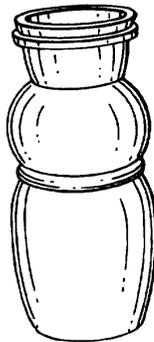
**Perla M. Kuhn** of **Hughes Hubbard & Reed LLP** for **Compagnie Gervais Danone**.

**Marlene D. Bell**, Trademark Examining Attorney, Law Office 105 (**Thomas G. Howell**, Managing Attorney).

Before **Chapman**, **Bucher** and **Rogers**,  
Administrative Trademark Judges.

Opinion by **Rogers**, Administrative Trademark Judge:

**Compagnie Gervais Danone** seeks registration of the  
bottle configuration set forth below for a wide variety of



goods.<sup>1</sup> The application was filed January 15, 1999 based on both applicant's bona fide intention to use the bottle configuration as a mark in commerce, 15 U.S.C. §1051(b), and, pursuant to Section 44 of the Lanham Act, 15 U.S.C. §1126, applicant's ownership of a French registration for the bottle design.

In the first office action, registration was refused under Lanham Act Section 2(e)(5), 15 U.S.C. §1052(e)(5),

---

<sup>1</sup> "DIETETIC PRODUCTS AND MEDICAL PREPARATIONS FOR SLIMMING, NAMELY, DIET PILLS, DIET CAPSULES, DIETARY SUPPLEMENTS, DIETARY FOOD SUPPLEMENTS, DIETARY DRINK MIX FOR USE AS A MEAL REPLACEMENT, FOOD FOR MEDICALLY RESTRICTED DIETS; VITAMINS, VITAMIN SUPPLEMENTS; AND BABY FOODS," in International Class 5;

"CEREAL FOR INFANTS, SOUPS, DEHYDRATED SOUPS, MILK, STEWED FRUIT, VEGETABLE PUREES, DEHYDRATED VEGETABLE PUREES, PRESERVED, DRIED, AND COOKED FRUITS, VEGETABLES, STEWED FRUITS AND VEGETABLES, JAMS, FRUIT SAUCES, JELLIES, SOUPS, MILK, DAIRY WHIPPED TOPPINGS, DAIRY PRODUCTS EXCLUDING ICE CREAM, ICE MILK AND FROZEN YOGURT; YOGURTS, YOGURT-BASED BEVERAGES, SOUR CREAM, CHEESES IN PASTE OR LIQUID FORM PLAIN AND FLAVORED; DAIRY-BASED BEVERAGES, SOUR MILK BASED FOOD BEVERAGES, LACTIC ACID BASED FOOD BEVERAGES, FERMENTED MILK PLAIN AND FLAVORED," in International Class 29;

"PORRIDGE AND POWDERED MILK, DESSERT SOUFFLES AND FLAVORED SWEETENED GELATIN DESSERTS," in International Class 30; and

"BEVERAGES, NAMELY, FRUIT AND VEGETABLE JUICE, PLAIN OR AERATED WATERS, FRUIT AND VEGETABLE DRINKS, LEMONADES, SODA WATER, SOFT DRINKS, SHERBETS, PREPARATIONS FOR MAKING FRUIT AND VEGETABLE DRINKS, LEMONADES, AND SOFT DRINKS, NONALCOHOLIC BEVERAGES CONTAINING FRUIT AND VEGETABLE EXTRACTS, NONALCOHOLIC DAIRY BASED BEVERAGES AND NONALCOHOLIC BEVERAGES CONTAINING SMALL AMOUNTS OF LACTIC FERMENTS," in International Class 32.

During prosecution of the application, which involved considerable amendment of the identification, the phrase "SYRUPS FOR MAKING FRUIT AND VEGETABLE DRINKS, LEMONADES, AND SOFT DRINKS" inadvertently was omitted from the International Class 32 listing of goods. The Board shall remedy the omission.

because the bottle design was deemed to be "de jure" functional and, in the alternative, under Sections 1, 2 and 45 of the Lanham Act, 15 U.S.C. §§1051, 1052 and 1127, because the design is not inherently distinctive.<sup>2</sup>

In addition to setting forth the refusals of registration, the Examining Attorney's action required applicant to address a number of issues regarding the contents of the application and provided advice regarding options available to applicant. In the latter category -- advice on options -- the Examining Attorney informed the applicant of its option to seek registration based upon a showing of acquired distinctiveness, pursuant to Section 2(f) of the Lanham Act, 15 U.S.C. §1052(f), and its option to seek registration on the Supplemental Register.<sup>3</sup> In the

---

<sup>2</sup> The functionality refusal itself actually was explained as having two alternative bases, i.e., "de jure" functionality, so that the design would therefore be unregistrable under any scenario and "de facto" functionality, so that the mark would be registrable upon a showing of inherent or acquired distinctiveness. The Board has explained that de facto functionality is not a ground for refusal under the statute, and the proper ground for refusal is that the design is not inherently distinctive and thus does not function as a trademark, so that refusal is appropriate under Sections 1, 2 and 45. See *In re Ennco Display Systems Inc.*, 56 USPQ2d 1279, 1282 (TTAB 2000). Thus, we consider the Examining Attorney's arguments regarding de facto functionality not as an alternative basis for the Section 2(e)(5) refusal but as part of the rationale for the refusal under Sections 1, 2 and 45.

<sup>3</sup> The office action is not entirely clear as to whether the alternative refusals of registration were being advanced tentatively or definitely. We take the information offered regarding Section 2(f) and the Supplemental Register to be

former category -- issues regarding the contents of the application -- the Examining Attorney required information regarding the authority of the individual who signed the application, required amendment of the identification of the various goods in the application, specified steps to be taken if classes were added as a result of clarifications or changes to the identification, suggested possible amendment of the drawing of the bottle design to clarify the features claimed to constitute a mark, suggested possible submission of a "clear and concise description of the mark,"<sup>4</sup> and required applicant to specify whether it would pursue registration on both filing bases for the application.

---

information regarding contingent options, only available to the applicant on eventual withdrawal by the Examining Attorney of the Section 2(e)(5) refusal or as alternative arguments for applicant to pursue in any appeal if both refusals were maintained and made final.

<sup>4</sup> Trademark Rule 2.35, 37 C.F.R. §2.35, states that a description "must be included [in the application] if required by the examiner." Moreover, the Trademark Manual of Examining Procedure states that Examining Attorneys should make the requirement in cases "where the mark is a configuration of the goods or packaging." TMEP §808.03. While the Examining Attorney obviously has discretion in regard to making the requirement, we note that it is very difficult in these types of cases to assess distinctiveness of a mark if a description is not included. In the case at hand, the Examining Attorney's suggestion that a clear and concise description "should" be included does not rise to the level of a requirement and evidences failure of the Examining Attorney to exercise her discretion one way or the other.

The applicant, in responding to the first office action, addressed certain of the informalities or requirements and, among other things, deleted the Section 1(b) basis for the application. The Examining Attorney's next action, a final refusal of registration, did not make final any requirements regarding informalities, so the only issues before us on appeal relate to registrability of the mark.

Before considering the refusals made final, we note that the final office action purported to accept and enter a "description of the drawing." We note, however, that applicant did not provide a specific description to accept, that applicant's response is not "marked" indicating that any particular language was accepted as a description, and that the office's search system lists no description.<sup>5</sup> The

---

<sup>5</sup> Applicant's response to the initial office action contained a number of subheadings, four of which clearly are intended to respond to informalities: "Color of Authority," "Drawing," "Dual Basis," and "Identification of Goods." None of these includes a description of the bottle design; the "Drawing" section states only that "the drawing is intended to represent only the configuration of the packaging," and does not constitute a description of elements of the design which applicant believes create a registrable mark.

In the "Remarks" section of the response, which essentially contains applicant's arguments in support of registration, there is a statement contained in the argument against the functionality refusal that applicant seeks registration of a "unique configuration, namely, the anthropomorphic form of the packaging, created by stacked bubble indentations in the plastic." It is not clear that this statement was offered as a description, especially in view of applicant's careful use of subheads to delineate its responses to the Examining Attorney's

significance of the omission is discussed infra, in our substantive discussion of the refusals of registration.

The final office action must be viewed as maintaining the functionality refusal under Section 2(e)(5), though it suffers from the same tentativeness and inappropriate references to de facto functionality as the initial office action. The final action also must be viewed as maintaining the refusal under Section 1, 2 and 45 based on the ground that the bottle design is not inherently distinctive. In discussing this second refusal, the Examining Attorney quotes at length from the Supreme Court's *Wal-Mart*<sup>6</sup> decision, and alternately asserts that applicant's bottle design should be considered as "product design" registrable only upon a showing of acquired distinctiveness or as "packaging" but packaging of a type that a consumer would not be predisposed to perceive as an indication of source. In order to make sense of this discussion, in a case where the products are various foods and beverages, we view the Examining Attorney's contention that applicant seeks to register a "product design" as part of her Section 2(e)(5) refusal. Hence, the design would,

---

various requirements. Moreover, it was not marked for entry in, and was not entered into, the office's search system.

<sup>6</sup> Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 54 USPQ2d 1065 (2000).

under this theory, be unregistrable as a matter of law, in the absence of a showing of acquired distinctiveness.

Conversely, we take her references to the design as packaging as support for her refusal under Sections 1, 2 and 45.

After issuance of the final refusal, applicant filed a notice of appeal and a request for reconsideration. In both its response to the initial office action and the request for reconsideration, applicant has been consistent in its arguments. In essence, applicant has argued that it is not seeking registration of a product design but, rather, trade dress in the nature of product packaging; that its bottle design is not a functionally superior design, so that refusal under Section 2(e)(5) is inappropriate; and that its design is inherently distinctive, whether assessed under the *Abercrombie*<sup>7</sup> or *Seabrook*<sup>8</sup> tests, and would be perceived as source indicating, so that a showing of acquired distinctiveness is unnecessary. Also, the request for reconsideration, clearly in response to a discussion in the final office

---

<sup>7</sup> *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759 (2d Cir. 1976).

<sup>8</sup> *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 196 USPQ 289 (CCPA 1977).

action, emphasizes that applicant seeks registration of the design of product packaging, not of a product.<sup>9</sup>

The Board suspended the appeal pending the Examining Attorney's review of the request for reconsideration. The Examining Attorney denied the request for reconsideration and "adhere[d] to the final action as written since no new facts or reasons have been presented that are significant and compelling with regard to the point at issue." The appeal was resumed. Applicant and the Examining Attorney filed briefs but an oral hearing was not requested.

The record before us is rather limited, considering the nature of the matter sought to be registered. In this regard, compare this case with In re Creative Beauty Innovations, Inc., 56 USPQ2d 1203 (TTAB 2000). In *Creative Beauty*, a case involving an application to register a cosmetics bottle design, the record included numerous third party registrations introduced by both applicant and the Examining Attorney, Internet web pages, a declaration from an officer in a sales and marketing firm, a letter from an

---

<sup>9</sup> We note that the request for reconsideration contains a number of passages that are marked with yellow highlighter. Likewise, applicant's appeal brief contains pencil notations in the margins. We have no way of knowing whether these were included by applicant, to draw our attention to certain points, or made by the Examining Attorney in her review of these filings. In regard to the latter, we note that, apart from data entry instructions, it is not generally appropriate for an Examining Attorney to write notes or comments on the contents of an application file.

officer of a company in the cosmetics industry, an article from a trade publication titled Packaging World, evidence that the container had garnered an award for its design, and a brochure illustrating the applicant's products in the container. By contrast, in this case, the record consists of three photographs of various types of beverage containers and a number of Internet web pages which show various beverage or yogurt containers, all introduced by the Examining Attorney with the action denying applicant's request for reconsideration; and a promotional flyer for a drinkable yogurt beverage applicant markets in its bottle (albeit with a label covering most of its surface), Internet web pages showing yogurt containers, and a photocopy of a page from what appears to be a supermarket advertisement which shows numerous containers for a variety of products, all introduced by applicant.

The thin record in this case may be the result of an extremely limited range of alternative food and beverage containers being compared with applicant's bottle. As further discussed, *infra*, applicant apparently chose to compare its bottle with traditional yogurt containers because it concluded that these were the closest products to the one product applicant has, to date, marketed in its bottle. By way of contrast, the Examining Attorney

compared applicant's bottle to containers used for various beverages, including at least two containers for drinkable yogurt. Both applicant and the Examining Attorney, however, fail to appreciate that applicant seeks to register its bottle design for a wide variety of goods. Therefore, containers for a wide variety of goods could fairly have been considered.

Turning to the refusals made final and the arguments advanced in support of or against these, we begin by noting that applicant, in its initial brief, argued against both the Section 2(e)(5) and Sections 1, 2 and 45 refusals, both of which had been adhered to by the Examining Attorney in her action denying the request for reconsideration. Nonetheless, the Examining Attorney failed to address squarely the Section 2(e)(5) refusal in her brief, so we consider this refusal to have been withdrawn.<sup>10</sup> Moreover,

---

<sup>10</sup> The Examining Attorney did quote the *Wal-Mart* decision's language that explains when a court is unsure whether a design constitutes a product or trade dress in the nature of packaging, the court should err on the side of considering the design to be a product and therefore registrable only on a showing of acquired distinctiveness. We do not consider this reference to be sufficient to maintain the refusal under Section 2(e)(5), especially in view of the absence of any citation to Section 2(e)(5) and the Examining Attorney's statement in her conclusion that "applicant's proposed mark is merely a packaging design."

Applicant, however, apparently was unsure about whether this refusal had been withdrawn, as it continued to argue in its reply brief that it seeks registration of a packaging design, not a product design and that its design is not properly refused as a functional product design.

even if we did not consider it to have been withdrawn, the Section 2(e)(5) refusal would have to be reversed, as the Examining Attorney put in no evidence whatsoever to support such a refusal. The only evidence of record consists of illustrations of various product-packaging designs, i.e., containers. While all of this is relevant to the issue of whether applicant's design is inherently distinctive, or registrable only on a showing of acquired distinctiveness, it is not probative on the issues relating to Section 2(e)(5) functionality, e.g., the superiority of applicant's design or the cost for producing its bottle.<sup>11</sup>

We turn, therefore, to the remaining refusal under Sections 1, 2 and 45. "In cases where it is not obvious that the design is commonplace, the examining attorney's obligation under the Trademark Act is to make a prima facie

---

<sup>11</sup> In the initial office action, the Examining Attorney required applicant to state whether its design is the subject of a patent and, if so, provide information regarding the patent. The Examining Attorney also required applicant to provide information about alternative designs, designs used by competitors, and to state whether alternative designs are equally efficient or more costly to produce. While it is certainly acceptable for an Examining Attorney to make such requirements, so that any subsequent conclusion on functionality will be fully informed, when such requirements do not yield the Examining Attorney any evidence to support a functionality refusal -- as in this case, where applicant stated both that there was no patent, and that its design is no more efficient than others and is not less costly to produce -- the Examining Attorney cannot make final a functionality refusal without any evidence to support the refusal. The Examining Attorney bears the burden of making out a prima facie case for refusal. In this case, there is no support whatsoever for a functionality refusal.

showing that applicant's container configuration is not entitled to registration." In re Creative Beauty Innovations, Inc., 56 USPQ2d 1203, 1205 (TTAB 2000). The Examining Attorney offered no evidence whatsoever to support the Sections 1, 2 and 45 refusal with either her initial office action or the final office action. Ultimately, however, the Examining Attorney made evidence of record with the office action addressing applicant's request for reconsideration.

Our assessment of whether applicant's design is entitled to registration as inherently distinctive<sup>12</sup> trade dress in the nature of product packaging is guided by *Abercrombie and Seabrook*. See *Creative Beauty, supra*, at 1206-07, finding these two tests complementary.

The first task in undertaking such an assessment is to consider the design features claimed to constitute applicant's mark. Cf. In re R.M. Smith, Inc., 734 F.2d 1482, 1484, 222 USPQ 1, 2 (Fed. Cir. 1984) (As a threshold matter, the Board may assess the functionality of the individual design features of a product, but must make its decision on registrability based on the design as a whole). As noted earlier, applicant was never required to supply

---

<sup>12</sup> Applicant does not seek registration based on a claim of acquired distinctiveness.

such a description and never offered a specific description. Thus, we are left to assess the features of the proposed mark based on the drawing, with our understanding of the drawing infused by comments applicant has made in its response to the initial office action, request for reconsideration, and briefs.

Applicant terms its bottle design "anthropomorphic"<sup>13</sup>, and asserts that it utilizes "stacked bubble indentations in the plastic," resulting in a "distinctive undulating pattern unrelated to any functional purpose." We note, too, that the bottle has a belt or ridge around both the pinched or "undulating" midsection and near the top. Applicant has neither claimed nor disclaimed the various vertical lines adorning the bottle as a feature thereof.<sup>14</sup> We do not, however, take these to be a feature of the applied-for mark. Though applicant has restricted the

---

<sup>13</sup> In regard to the asserted anthropomorphism of the design, applicant states the design "may suggest the appearance of a creature, such as a snowman or one of the roly-poly animals featured in Applicant's advertising and labeling."

<sup>14</sup> As with a description of the mark, the Examining Attorney has discretion to require a lining statement. See TMEP §807.06(a) ("[I]f the meaning of the lining or stippling is not clear, the examining attorney, at his or her discretion, may ask that an explanation as to lining be made of record.") Since the features of trade dress in the nature of packaging can vary so widely, it certainly is possible that a party might choose to adorn its bottle design with various vertical lines, such as those shown on applicant's bottle. Thus, entry of a lining and stippling statement would have been helpful.

basis for its application to Section 44 of the Lanham Act, and therefore was not required to submit specimens showing use of its design, applicant did submit a sales flyer showing use of the bottle for one of the various items listed in its identification. This shows the bottle to be opaque. We therefore view the lining not as a feature of the design, but as an attempt to show the contour and opaque nature of the bottle.

The Examining Attorney argues that this configuration is not inherently distinctive and it is not reasonable to assume that consumers would be predisposed to view the container as an indicator of source. Thus, the Examining Attorney concludes that the design should not be registered in the absence of a showing of acquired distinctiveness. Specifically, the Examining Attorney argues that the container is not anthropomorphic and that she "has provided evidence that shows that food and beverage containers with 'stacked bubble indentations' are quite *common*." (Emphasis in original.) As noted earlier, the evidence introduced by the Examining Attorney consists of three photographs of various types of beverage containers and a number of Internet web pages that show various beverage or yogurt containers.

Applicant, in contrast, argues that the design is inherently distinctive; that it is in use as a container for a yogurt-based beverage; that there are no direct competitors for this exact product<sup>15</sup>; that the product is sold in the yogurt section of grocery stores; that a survey of containers for yogurt shows that there are competitive alternatives which do not utilize the anthropomorphic shape that applicant uses and are, instead, smooth cylindrical containers. Applicant also argues that its bottle design is a combination of arbitrary and fanciful features; does not serve to describe any aspect or feature of applicant's goods or assist, any more than any competitive alternative, in the effective packaging of applicant's goods; that the container is not a common, basic shape, "such as a rectangular-shaped box or a cylindrical jar"; that the design is, instead, a "combination of different shapes not ordinarily encountered in the marketplace"; that containers for competitive products do not resemble applicant's container, in that they are "typically smooth, cylinder shapes and do not tuck in at the middle"; that applicant's

---

<sup>15</sup> This point of applicant's argument was first advanced in applicant's request for reconsideration. Though other points made in that request were reiterated in applicant's brief, this particular point was not, perhaps because the Examining Attorney introduced evidence of the existence of both drinkable yogurts and a yogurt packaged in a squeezable tube.

design is not a mere refinement of the typical design but, rather, is unique and playful; and that, because none of the container designs placed in the record by the Examining Attorney resembles applicant's arbitrary and unique design, it is clear that the Examining Attorney has not provided sufficient support for the refusal of registration.

We agree with the Examining Attorney's contention that applicant's bottle design is not anthropomorphic. We take judicial notice that anthropomorphic means "ascribing human form or attributes to a being or thing not human, esp. to a deity" and "resembling or made to resemble a human form."<sup>16</sup> If we accept applicant's contention that its design is evocative of a snowman, then the design is not anthropomorphic, but is evocative of something, i.e., a snowman, that itself is anthropomorphic. Likewise, applicant relies on the labels used on applicant's container that, it appears from the record, are shrink-wrapped around it. While the "roly-poly animals" on these labels may be anthropomorphic in that they are engaged in human activities, the bottle is not. Moreover, the trade

---

<sup>16</sup> The Random House College Dictionary 57 (Revised Ed. 1982). The Examining Attorney, in her brief, asked that we take judicial notice of a definition of anthropomorphic, but the definition apparently came from an on-line dictionary. The Board will not take judicial notice of on-line dictionary definitions introduced during briefing. In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999).

dress applicant seeks to register does not include any labeling. In a trade dress infringement context, consideration of the entire trade dress may be appropriate. See, e.g. Nora Beverages Inc. v. Perrier Group of America, \_\_\_ F.3d \_\_\_, 49 USPQ2d 1385, 1389 (2<sup>nd</sup> Cir. 1998) [*Nora I*]. In this Board proceeding focused solely on the issue of registrability, however, we are limited to consideration of the particular element of applicant's overall trade dress which it seeks to register, i.e., the bottle design devoid of its anthropomorphic labeling.

Of course, merely because applicant's bottle design cannot properly be termed anthropomorphic, it does not necessarily follow that the design cannot be inherently distinctive. However, we specifically find that the combination of features in applicant's design are not arbitrary, are not devoid of utility, and the overall design is not inherently distinctive.

The relatively broad opening of the top of the bottle seems well-suited to a container from which one would drink, an act illustrated by the boy in applicant's advertisement for its drinkable yogurt. Also, the band or rib around the top seems to set off that portion of the top that the foil cap covers. We believe consumers would

perceive these features of the design in a similar fashion and, hence, would not view them as source indicating.

Further, the undulating shape created by the pinched or indented waist, the ridge or belt running around that waist, and the inward tapering toward the top and bottom are also not source indicating. The undulating pattern is also present in the Snapple brand Whipper Snapple beverage bottle, shown in one of the photographs introduced by the Examining Attorney. Likewise, an adjacent beverage bottle in the same photo shows a bottle with numerous ribs or bands, like the two that circle the top and middle of applicant's bottle design. Moreover, these features, in the context of a water bottle, have been noted to have functional or utilitarian aspects. See Nora Beverages Inc. v. Perrier Group of America Inc., \_\_\_ F.3d \_\_\_, 60 USPQ2d 1038, 1042 n. 4 (2<sup>nd</sup> Cir. 2001) [*Nora II*] (Plaintiff's ribbed bottle, with a waist that creates a "bottle-upon-bottle" effect observed to be functionally superior to both square bottle and cylindrical bottle with ribs because it "fits the hand more snugly and helps prevent slippage from condensation and perspiration. The 'bottle-upon-bottle' effect that forms the bottle's 'waist' creates a very useful groove into which a thumb and forefinger can rest comfortably..."). Moreover, the *Nora II* court affirmed the

district court's finding that such design, with minor variations, was generic for water bottles. In this regard, we note that "plain or aerated waters" are among the goods listed in applicant's identification.

We do not suggest, by these comments, that we are ruling in any way on the functionality refusal apparently withdrawn by the Examining Attorney. We do mean to make the point, however, that aspects of a bottle design which are shared with other bottles and which have recognized utilitarian attributes cannot create "trade dress ... of such a design that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers," which must be the focus of our inquiry regarding the question of inherent distinctiveness. Tone Brothers Inc. v. Sysco Corp., 28 F.3d 1192, 1205, 31 USPQ2d 1321, 1331 (Fed. Cir. 1994).

Applicant's bottle design is not, contrary to applicant's argument, particularly arbitrary or fanciful but, rather, may readily signal to a consumer that the contents of the bottle are a drinkable beverage. A container, to be found unique and arbitrary, and therefore registrable as inherently distinctive trade dress, must be more than just the only one of its type; it must be original, distinctive and peculiar in appearance. See In

**Ser No.** 75/621,184

re McIlhenny Co., 278 F.2d 953, 126 USPQ 138, 140 (CCPA 1960). Cf. In re Glaxo Group Ltd., 53 USPQ2d 1920, 1922 (TTAB 2000). Applicant's bottle design does not meet the *Tone Brothers* criteria, i.e., it is not a design of such type that consumers "will immediately rely on it to differentiate [applicant's] product[s] from those of competing manufacturers." We find that applicant's container design is not inherently distinctive.

Decision: The refusal of registration under Sections 1, 2 and 45 of the Lanham Act is affirmed.